Supreme Court, U.S.
FILED
MAY 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1292

In the Supreme Court of the United States

OCTOBER TERM, 1987

PHILIP ANTHONY JEDLICKA, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
KENNETH L. GREENE
REGINA S. MORIARTY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Tax Court abused its discretion in refusing to consider issues that were not raised in a taxpayer's pro se petition, but instead were raised for the first time three days before trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Christensen v. *Commissioner*, 786 F.2d 1382 (9th Cir. 1986) 6
Holmes v. *Goldin*, 615 F.2d 83 (2d Cir. 1980) 4

Statutes and rules:

Internal Revenue Code (26 U.S.C.):
§ 6651(a)(1) 1
§ 6653(a) 2
§ 6654 2

T.C.R. of Prac. & P.:
Rule 34(b)(4) 3
Rule 41(a) 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1292

PHILIP ANTHONY JEDLICKA, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1987. The petition for a writ of certiorari was filed on January 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During 1978 through 1981, petitioner received both wages from the United States Postal Service and also some rental income. He did not, however, file federal income tax returns for those years. The Commissioner determined deficiencies and additions to tax against him.[1] Petitioner

[1] The additions to tax were for failure to file a return (26 U.S.C. 6651(a)(1)), negligence or intentional disregard of the rules or regula-

filed a petition in the United States Tax Court on April 6, 1983. Petitioner did not dispute that he received the wages and other income. But he contended that the Commissioner had failed to allow unspecified amounts of various deductions incurred in connection with the rental income that he received, and that the Commissioner had incorrectly determined the amount of that rental income (Doc. 2, at 1-2; see Pet. 3).[2]

When the case was first called for trial on February 4, 1985, petitioner obtained a continuance on the ground that he was unprepared, although he was reprimanded by the court for failing to prepare for trial and instead seeking a continuance on its eve (Doc. 11; I-Tr. 2-10). The trial was rescheduled for Monday, December 9, 1985. On Friday, December 6, 1985, petitioner presented the Commissioner with completed tax returns for the years at issue together with what he represented to be numerous supporting documents. On those returns, petitioner for the first time claimed deductions for education expenses, business losses, and home office expenses (II-Tr. 2-5; III-Tr. 2-4, 39-40).

When the trial commenced, on December 9, 1985, petitioner indicated that he intended to establish that he was entitled to the education, business loss, and home office deductions claimed for the first time on December 6, 1985. The Tax Court construed petitioner's attempt to assert the additional deductions as a motion to amend his petition,

---

tions (26 U.S.C. 6653(a)), and underpayment of the estimated tax (26 U.S.C. 6654).

[2] "Doc." references are to the documents comprising the original record on appeal as numbered by the Clerk of the Tax Court. "I-Tr.," "II-Tr.," and "III-Tr." references are to the separately certified transcripts of proceedings held before the Tax Court on February 4, 1985 (I), and on December 9, 1985 (II and III), respectively.

and it denied leave to amend the petition. The court stated that "justice requires that the motion to amend the petition be denied" (III-Tr. 43). The court explained that "it is highly prejudicial to the Government's case for you to file your returns on the eve of trial, claim substantial losses, and expect the other side to conduct an audit of your return so close to trial" (*ibid.*). Thereafter, the parties settled their dispute with respect to the rental income and related expenses, and stipulated to the Tax Court's decision (Doc. 13).

2. The court of appeals affirmed (Pet. App. 15-17). The court held that the Tax Court correctly viewed petitioner's attempt to introduce new issues into the proceeding on the eve of trial as a motion to amend and that the Tax Court did not abuse its discretion in denying the motion.

ARGUMENT

1. The court of appeals correctly upheld the Tax Court's refusal to allow petitioner to raise new issues on the eve of trial. Rule 34(b)(4) of the Rules of Practice and Procedure of the United States Tax Court requires that a petition set forth clear and concise assignments of error and statements of facts in support of the assigned errors. Since the taxpayer's petition did not assign any error or allege any facts with respect to education, home office, or business loss deductions, it would have been impermissible to allow petitioner to raise those issues at trial without amending the petition (see Pet. App. 16).

Tax Court Rule 41(a) permits a taxpayer to seek to amend his petition by leave of court and provides that leave shall be freely given when justice so requires. The Tax Court concluded, however, that it was not appropriate in the circumstances presented here to allow

petitioner to amend his petition to raise new issues on the eve of trial, and the court of appeals correctly upheld this discretionary decision. Petitioner had more than two and a half years to prepare his case for trial after he filed his Tax Court petition, yet he waited until the eve of trial to raise the new issues. Justice did not require the Tax Court to allow petitioner to amend his petition to introduce new issues at that late date. Moreover, under such circumstances, allowing petitioner to amend his petition would have unduly prejudiced the Commissioner by effectively denying him any reasonable opportunity to analyze the factual and legal grounds for the new claims.[3]

2. Petitioner's primary objection is not to the grounds upon which the courts below decided this case, *i.e.*, that it was a proper exercise of the Tax Court's discretion to deny leave to amend the petition on the eve of trial. Rather, petitioner maintains that there was no need to amend his petition because the original petition should have been liberally construed to cover claims to education, business loss, and home office deductions. Petitioner contends (Pet. 7-13), therefore, that the decision below should be read as holding that "the Tax Court may strictly and nar-

---

[3] Petitioner erroneously claims (Pet. 11-12) a conflict with *Holmes* v. *Goldin*, 615 F.2d 83, 85 (2d Cir. 1980), which states that a pro se litigant should be allowed "fairly freely" to amend his complaint. That decision, however, does not suggest that a pro se litigant must *always* be allowed to amend his complaint, even if the request is made on the eve of trial and would prejudice the opposing party. Here, Tax Court Rule 41(a) permits any petitioner to amend his complaint "fairly freely." On the facts here, however, the courts below concluded that petitioner was not entitled to wait two and one half years and then amend his complaint on the eve of trial. Petitioner gives no reason for doubting the correctness of that conclusion, especially in light of the fact that the defect in the petition was not a technical one that could be ascribed to a pro se petitioner's unfamiliarity with Tax Court procedure. See point 2, *infra*.

rowly construe pleadings of pro-se litigants" (Pet. 7) and that that holding conflicts with decisions of this Court and of other courts of appeals. This contention is plainly without merit.

First, the court of appeals made no pronouncement about the manner in which pro se pleadings should be construed. It did not even discuss whether the original Tax Court petition encompassed the issues that petitioner sought to raise at trial; the court of appeals' opinion focused entirely on whether the Tax Court abused its discretion in denying leave to amend the petition. Thus, there is no basis for claiming that the court of appeals' decision conflicts with other opinions setting forth standards for construing pro se pleadings.

Moreover, it is clear that, even under the most liberal reading of the petition, it cannot be construed to raise issues relating to education, home office, or business loss deductions. The petition's description of the objections to the Commissioner's determination was fairly detailed, but all of the objections related to the calculation of the taxable income from his rental property (see Pet. 3). Thus, the defect in the petition that limited the issues petitioner could raise at trial was not a failure to "strictly comply with the technical rules of Tax Court procedure" (Pet. 7) for which a pro se litigant might be excused; the defect was that petitioner sought to raise at trial unrelated issues that he had not raised when he filed his petition or at any time thereafter until the eve of trial.[4] The fact that the defect in the petition was not technical in nature, but rather reflected what petitioner actually intended to raise in the

---

[4] To the extent of the rental income issues actually raised therein, the petition was not defective at all, and petitioner obtained some relief on those issues as a result of having filed the petition (see Doc. 13).

petition, is confirmed by petitioner's subsequent statements. When the case was first called for trial on February 4, 1985, petitioner stated to the court that his objections were to the treatment of his rental income and made no mention of the other claims that he subsequently sought to raise on the eve of trial.[5] In sum, the decisions below are fully consistent with the principle that the pleadings of a pro se litigant should be liberally construed.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
KENNETH L. GREENE
REGINA S. MORIARTY
Attorneys

MAY 1988

[5] Petitioner stated (I-Tr. 6-7):

> At issue is the fact that they credited me with income from my rental property, but they failed to take into account any of the utilities or any of the bills that were part of operating that property. And the bottom line is that the property—they're crediting me with income, and there was no income.

[6] Petitioner relies (Pet. 9-10) on *Christensen* v. *Commissioner*, 786 F.2d 1382 (9th Cir. 1986), for the proposition that papers filed by a pro se litigant should be liberally construed and treated as a motion to amend where appropriate. That principle, however, was followed here, not rejected. The Tax Court treated petitioner's untimely attempt to raise issues not included in the petition as a motion to amend, even though no such motion technically was filed.

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60422